LE COPY

FILE
OCT 31
HAROLD R. WILL

No. 12

IN THE

# SUPREME COURT

OF THE

# United States

PATRICK E. IRVINE,
*Defendant and Appellant,*
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Appellee.*

## APPELLANT'S OPENING BRIEF

MORRIS LAVINE
215 W. 7th Street
Los Angeles 14, Calif.
*Attorney for Appellant.*
Telephone: TRinity 3241

BLEED THROUGH- POOR COPY

## TOPICAL INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Constitutional Provisions and Statutes Involved | 1 |
| Statutes Involved | 2 |
| Jurisdiction | 11 |
| Statement of the Facts | 11 |
| Questions Presented | 25 |
| Summary of Propositions Relied Upon | 27 |
| Argument | 31 |
| I. Congress Had a Constitutional Right to Impose the Wagering Tax, Article I, Section 8, U. S. Constitution. McCray v. U. S., 195 U. S. 27. When Congress, by Title 26, Sections 3285, 3287, Passed an Act Fixing a Tax Upon Wagering Throughout the United States, the Person Upon Obtaining Such a Stamp and Paying the Tax was Entitled to Carry on Wagering Without Interference From State Authorities. A State May Not Interfere With or Defeat a Federally Imposed Tax by Molesting and Arresting the Person Paying Such Tax and Thereby Defeating the Tax and Its Future Collections. Congress in Fixing Such a Tax Did So Upon the Theory That it was Imposing a Tax Upon a Legal Operation—Not an Illegal Operation | 31 |


BLURRED COPY

Page

II. A. Where All Persons Engaged in the Business of Wagering are Compelled by a Law to Make a Declaration Thereof and Pay the Tax and Can Be Convicted Upon the Basis of Evidence Obtained by Such Compulsion Under Federal Statutes, the Use of Such Evidence in a State Court Constitutes a Violation of Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States ..... 35

B. By Its Use Statutory Immunity Is Granted Under Section 334 California Penal Code ..... 35

III. The Secret Making of a Key to Appellant's Home and Burglarious Entry Into the Home and Installation of Sound and Recording Devices and the Taking of Testimony Heard Over Such Apparatus, Including Telephonic Conversations, Without the Consent of the Receiver or the Sender Constitutes the Obtaining of Evidence by Standards Contrary to the Fundamental Principles of Justice That Inhere in Our Institutions. The Courts Must Preserve Their Own Purity by Excluding Such Evidence. The Use of Such Evidence Requires the Reversal of the Judgments Below ..... 42

BLEED THROUGH– POOR COPY

Page

IV. Congress Banned Use of Intercepted Telephone Communication. Schwartz v. Texas Should Be Overruled ..... 51

---

## TABLE OF CASES AND AUTHORITIES CITED

### Cases

Page

Ashcraft v. Tennessee, 327 U. S. 274, 90 L. Ed. 667 ..... 48

Ballman v. Fagin, 200 U. S. 186; 50 L. Ed. 433 ..... 39

Bethlehem Steel v. New York Labor Rel. Bd., 330 U. S. 773; 91 L. Ed. 1245-6 ..... 35

Betts v. Brady, 316 U. S. 455, 462, 473; 86 L. Ed. 1595, 1601, 1607 ..... 36-37, 42

Boyd v. U. S., 116 U. S. 616 ..... 37, 42

Broderick v. Rosner, 294 U. S. 629; 79 L. Ed. 1100 ..... 34-35

Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819 ..... 36, 39, 42

Burrell v. Montana, 194 U. S. 572; 48 L. Ed. 1122 ..... 39

Byars v. U. S., 273 U. S. 28 ..... 43

Chambers v. Florida, 309 U. S. 227 ..... 48, 50

Choctaw etc. Railroad Company v. Harrison, 235 U. S. 292, 59 L. Ed. 234 ..... 33

Counselman v. Hitchcock, 142 U. S. 547 ..... 38

Cross v. North Carolina, 132 U. S. 131, 33 L. Ed. 287 ..... 33

BLURRED COPY

Page

District of Columbia v. Little, 178 (2d) 13, 18; 339 U. S. 1 ..... 47
Dobbin v. Erie County, 16 Fed. 435, 10 U. S. (L. Ed.) 1022 ..... 33
Easten v. Iowa, 188 U. S. 220, 47 L. Ed. 452 ..... 33
Eno, In re, 54 Fed. 669 ..... 33
Ex parte Clark, 103 Cal. 352 ..... 38, 39, 40, 41
Ex parte Cohen, 104 Cal. 524 ..... 38, 39, 40, 41
Farmer's etc. Nat'l Bank v. Erie, 91 U. S. 29, 23 L. Ed. 196 ..... 34
Farmers, etc. Savings Bank v. Minnesota, 232 U. S. 516, 58 L. Ed. 706 ..... 33
Feldman v. U. S., 322 U. S. 487, 490-3 ..... 35, 36, 37, 38, 43
Glickstein v. U. S., 222 U. S. 139; 56 L. Ed. 182 ..... 39
Goldman v. United States, 316 U. S. 129, 134 ..... 45, 51
Gouled v. United States, 255 U. S. 296 ..... 43, 44
Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652 ..... 39
Harris v. U. S., 331 U. S. 158 ..... 37
Hebert v. Louisiana, 272 U. S. 312 ..... 37
Heike v. U. S., 217 U. S. 423; 54 L. Ed. 821 ..... 39
Hill v. Florida, 325 U. S. 538, 542; 89 L. Ed. 1782, 1785 ..... 35
Illinois v. Campbell, 329 U. S. 362, 370, 91 L. Ed. 355 ..... 34
Jack v. Kansas, 199 U. S. 372; 50 L. Ed. 234 ..... 36, 39
Lisenba v. California, 314 U. S. 219; 86 L. Ed. 166 ..... 37, 44
Malinski v. N. Y., 324 U. S. 401 ..... 37
Marron v. U. S., 275 U. S. 192, 72 L. Ed. 230 ..... 54

BLEED THROUGH– POOR COPY

Page
Maurer v. Hamilton, 309 U. S. 598 ..... 35
McClain v. Superior Court, 99 Cal. App. (2) 214 ..... 39, 40, 41
McCray v. U. S., 195 U. S. 27, 49 L. Ed. 78, 1 Am. Cas. 561 ..... 31, 32
McCulloch v. Maryland, 4 Wheat. 316, 5 U. S. (L. Ed.) 579 ..... 33
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819 ..... 43
Morris v. Jones, 329 U. S. 553; 91 L. Ed. 497 ..... 35
Nardine v. U. S., 302 U. S. 308; U. S. 247 P. (2) 702 ..... 48, 51
Nardone v. U. S., 308 U. S. 338, 84 L. Ed. 307 ..... 51
Neuslein v. The District of Columbia, 115 (2) 699 ..... 46
Olmstead v. United States, 277 U. S. 438 ..... 45, 48, 49, 51
On Lee v. U. S., 343 U. S. 747; 96 L. Ed. 1270 ..... 43, 49
Opp. Cotton Mill, Inc., v. Administrator, 312 U. S. 144 ..... 32
Owensborough National Bank v. Owensborough, 173 U. S. 664, 43 L. Ed. 850 ..... 34
People v. Dent, 371 Illinois 33, 19 N. E. (2) 10, 20 ..... 47
People v. Fryer, 175 Cal. 785 ..... 38
People v. Knowles, 27 Cal. App. 498 ..... 38
People v. McCormick, 102 Cal. App. (2) 953; 22 U. S. (2) 349 ..... 40, 41
Rittenhouse v. Superior Court, 20 Cal. (2) 71 ..... 39, 40, 41
Rochin v. California, 342 U. S. 165 ..... 21, 30, 37, 40, 42, 48, 49, 50, 53

BLURRED COPY

Page

Schwartz v. Texas, 73 Sup. Ct. (2d) 232; 21, L. W. 4055 ..... 30, 49, 51, 52, 53

Silverthorn Lumber Company v. United States, 251 U. S. 385 ..... 46

Smith v. U. S., 337 U. S. 137; 93 L. Ed. 1264 ..... 38, 39, 40, 41

Sorrells v. United States, 287 U. S. 435 ..... 48, 49, 50

U. S. v. Busbee, 38 Fed. 99 ..... 33

U. S. v. Darby, 312 U. S. 100 ..... 32

U. S. v. Monia, 317 U. S. 424 ..... 41

U. S. v. Oklahoma, 261 U. S. 253, 260 ..... 33-34

United States v. Fisher, 2 Cranch. 358, 2 U. S. (L. Ed.) 304 ..... 32

United States v. Jesse Jeffers, Jr., 342 U. S. ..... 46

United States v. On Lee, 193 (2) 306 ..... 47

United States v. Trupiano, 334 U. S. 369 set out at page 705 ..... 43

Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 113; 71 L. Ed. 560-566 ..... 41

Veazie Bank v. Fenno, 8 Wall. 533, 19 U. S. (L. Ed.) 482 ..... 34

Watts v. Indiana, 338 U. S. 49; 93 L. Ed. 1801 ..... 41

White v. Texas, 310 U. S. 530 ..... 48

Williams v. Callacaga, 57 U. S. (L. Ed.) 275 ..... 33

Wolf v. Colorado, 338 U. S. 25; 93 L. Ed. 1782 ..... 41

Yates v. Jones National Bank, 206 U. S. 158; 51 L. Ed. 1002 ..... 33

Zap v. United States, 328 U. S. 624; 90 L. Ed. 1477 ..... 40, 41, 47

BLEED THROUGH– POOR COPY

**Codes, Statutes, etc.**


| | Page |
|---|---|
| Branstedt, "Dictatorship and Police Power in 1945," page 144 | 47 |
| California Constitution, Article I, Section 19 | 29, 43, 47 |
| United States Code | |
| Title 28, Section 1257 | 11 |
| Title 28, Section 2101-4 | 11 |
| Title 47, Sec. 605 F. C. C. Act | 9, 28, 30, 48, 51, 52 |
| Compulsory Testimony Act of Feb. 11, 1893 | 38 |
| Constitution of the United States | |
| Article I, Section 8 | 1, 31, 32 |
| Article VI, Clause 2 | 34 |
| Fourth Amendment | 43, 44, 47 |
| Fifth Amendment | 27, 29, 35, 36, 38, 44 |
| Fourteenth Amendment | 2, 16, 24, 25, 26, 27, 29, 30, 35, 36, 38, 45, 48, 50 |
| Internal Revenue Code | |
| Title 26, Section 3265-3267 (65 Stat. 529) | 28 |
| Title 26, Section 3285 | 2, 31 |
| Title 26, Section 3287 | 4, 31, 36 |
| Penal Code of the State of California | |
| Section 334 | 7, 26, 27, 29, 35, 37, 38, 39, 40 |
| Section 337a, subdivisions 1, 2, 3, 4 and 5 | 4, 15 |
| Section 459 | 8, 43 |
| Section 639 | 8 |
| Section 640 | 7, 16, 28, 29, 30, 42, 51, 53 |
| Title 12, Chapter 3 | 15 |
| Rules of the Supreme Court of the United States, Rule 38½ | 11 |


BLURRED COPY

Page

Western Wire Tapping Problem, 52 Col. L. Rev. 165 ..... 51

49 U. S. C. A. Sec. 46 F. C. A. ..... 38

BLEED THROUGH– POOR COPY

IN THE

# SUPREME COURT

OF THE

# United States

| | |
|---|---|
| PATRICK E. IRVINE,<br>*Defendant and Appellant,*<br>vs.<br>PEOPLE OF THE STATE OF CALIFORNIA,<br>*Plaintiff and Appellee.* | No. 12 |

## APPELLANT'S OPENING BRIEF

### OPINION BELOW

Opinion Below is found in 248 Pac. (2d) 502 and in 113 Cal. App. (2d) 460 and is also contained on page 964 of the record of this Court and also on page 983 of the record.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

BLURRED COPY

Fourteenth Amendment to the Constitution of the United States, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTES INVOLVED

*Title 26, Section 3285 of the Internal Revenue Code,* provides as follows:

> "§3285. Tax.
>
> (a) Wagers. There shall be imposed on wagers, as defined in subsection (b), and excise tax equal to 10 per centum of the amount thereof.
>
> (b) Definitions. For the purposes of this chapter—
>
> (1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.
>
> (2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The

BLEED THROUGH– POOR COPY

term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) and drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager

BLURRED COPY

placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. Oct. 20, 1951, 2:07 p. m. E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

*Title 26, Section 3287 of the Internal Revenue Code,* provides as follows:

"§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

*Section 337a, subdivisions 1, 2, 3, 4, and 5, of the Penal Code of the State of California,* provides as follows: Every person,

BLEED THROUGH– POOR COPY

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or best, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the

BLURRED COPY

result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds or any part thereof whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or . . .

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive. [Added by Stats. 1909, p. 21; Am. Stats. 1911, p. 4.]"

BLEED THROUGH– POOR COPY

*Section 334 of the Penal Code of the State of California,* provides as follows:

> "§334 [Incrimination]: Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. [Enacted 1872.]"

*Section 640 of the Penal Code of the State of California,* is as follows:

> "§640 [Tapping or unauthorized connection with telegraph or telephone line; Interception of communications and use of information so obtained; Aiding or conspiring to tap line: Punishment.] Every person who, by means of any machine, instrument, or contrivance or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telepgraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from or received at any place within the state; or who uses,

BLURRED COPY

or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. [Enacted 1872; Am. Stats. 1905, p. 691; Stats. 1915, p. 210.]"

639. [*Employee using information contained in telegraphic or telephonic messages: Punishment.*] Every agent, operator or employee of any telegraph or telephone office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

Section 459, California Penal Code:

*459 (Burglary defined):*

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the

BLEED THROUGH– POOR COPY

Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. (Enacted 1872; Am. Code Amdts. 1875-76; p. 111, Stats. 1913, p. 228; Stats. 1947, ch. 1052, §1.)"

*Title 47, Section 605,* as follows:

"§605. Unauthorized publication or use of communications. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any

BLURRED COPY

interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

BLEED THROUGH– POOR COPY

## JURISDICTION

Jurisdiction is conferred by Title 28, Sections 2101-4, Title 28, Section 1257, and Rule 38½ of the Rules of the Supreme Court of the United States. Petition For Certiorari was granted by this Court on the 6th day of March, 1953. (73 Sup. Ct. Rep. 646.)

## STATEMENT OF THE FACTS

On November 5, 1951, Patrick E. Irvine, the appellant, applied for and obtained a special wagering stamp from the Department of Internal Revenue of the United States and the Tax Division thereof, for which he paid the sum of fifty dollars. (R. 133.) He made his formal application for the stamp, filled out the form required by law to be filled out, and gave it to the Tax Division which issued the stamp to him. Following this procedure, the state authorities employed Russell D. Mason (R. 18) to install microphones and electric devices on behalf of the City Police Department of the City of Long Beach into his private dwelling or home and to attach a recording machine thereto which led to a garage about eight hundred feet distant from the home.

The police hired a keysmith to figure out and secretly make a duplicate key for one of the doors to appellant's residence at 3916 E. 2nd Street in the City of Long Beach, California, which was the home of the appellant and his wife, Mildred.

BLURRED COPY

The police strung wires from the Irvine home on East Second Street to about seven or eight hundred feet distant to the garage, where a microphone and recording device was installed. They entered the house secretly and without any search warrant or any other legal process with the key previously made from an impression taken from the lock of the front door of Irvine's home without the knowledge or consent of Irvine, to install the microphone and listening device and then, thereafter, while the appellant was away, they secretly entered twice after that and changed the microphone, both on December 8th and on December 28th, 1951, because of interference from a fluorescent lamp which made the hearing over the recording device very difficult (R. 135).

After the microphone had been installed, Mr. Mason, together with police officers Calori, Gautt, Hermansen, Kennedy and Jacobsen were detailed to work at stated hours in the garage with the amplifier and to listen to conversations which they heard and desired to have recorded and to use for the benefit of the people of the State of California and the City of Long Beach, to prosecute the defendant. Through the secret listening device it was discovered that Mr. Lippe, another defendant, was entering the defendant's home and that he also returned to a building in Los Alamitos, Orange County, 19851 Chestnut Street, in that city, where he had two phones and various alleged bookmaking apparatus and paraphernalia.

BLEED THROUGH– POOR COPY

Through the installed devices, at Mr. Irvine's private home, the officers listened in on telephone conversations in which they would hear Mr. Irvine dial the telephone and then call what they denominated as bets to some person on the other end of the phone, referring to that person on such occasions as "Jamoke" who it was asserted is a nickname for Mr. Lippe. On various occasions they heard Mrs. Irvine call out bets on the horse races, naming the track and the horses and the amounts of bets taken which were related in the phone conversations. After several weeks of listening to and recording the telephone conversations, and other conversations, on January 5, 1952, by pre-arranged plan, having learned the streets that were driven on these trips back and forth, it was agreed among the officers that Mr. Jacobsen would obtain a quantity of fluorescent powder which is invisible ordinarily and is not visible at all unless and until subjected to an ultra-violet ray lamp. It was further agreed that they would stage a pretended road block when Pete Curti was making his trip back to Mr. Irvine's home and as part of that plan Mr. Gautt, one of the officers who had been working on this case at the garage was a decoy. He was to be stopped, then have his stopped automobile searched as though someone had just committed a holdup over in Garden Grove and that vicinity. It was further suggested that Mr. Gautt was to get his automobile directly in front of Pete Curti's automobile so that when he was stopped the Curti automobile would be stopped directly behind

BLURRED COPY

him. There were motorcycle officers there to stop both persons, none had any search warrants or any lawful right to make the stop. Mr. Gautt was compelled to get out of his car and hold up his hands for a search and a gun was found in the waistband of his trousers and the gun was taken and he was told to get in the car. Directly behind the car was Mr. Curti's car and in the car with him at that time was Audie Greer. The same idea was carried out by officers there. They were told a hold-up had just been perpetrated and it was a similar car in which Mr. Curti was riding. Mr. Curti and Audie Greer got out of the car and there were a number of papers, and other articles alleged to be betting markers partly concealed under the coat of Audie Greer which she held in her hand and which she was directed to place everything back in the car. The officers being in uniform at that time she laid these things down on the seat of the car and while pretending to search the car Mr. Jacobsen with a fluorescent powder all over his hands, pawed through the papers and pretended to look for guns and impregnated all of the papers with the fluorescent powder. Some of the papers were taken from the shirt pocket of Mr. Curti which were perfunctorily examined and also impregnated with the fluorescent powder and given back to him and they were permitted to go on their way. A short time later after they had gone to the home of Mr. Irvine, officers entered, and placed Mr. Irvine under arrest. In his desk and about his desk in addition to many things, they asserted that they had found these same

BLEED THROUGH– POOR COPY

papers with the same fluorescent powder on them and they were subjected to the ultra-violet ray test in the presence of Mr. Irvine. They compelled him to exhibit his hands under a fluorescent lamp. They also put the ultra-violet light upon his hands and there was fluorescence all over his hands, so they asserted. These papers it was alleged were betting markers. No search warrant was obtained in accordance with Title 12, Chapter 3 of California Penal Code, to enter his home nor to search or take the papers seized.

The appellant was convicted of violation of Section 337A subdivisions 1, 2, 3 and 4 of the Penal Code of the State of California (R. 110, 111, 112 and 113) as alleged in Counts II, III, IV and V of the information (R. 1 to 4).

The number of the stamp tax was set out in the information or charge against the petitioner which was filed by the State (R. 1). During the course of the trial the application for a stamp and the stamp tax itself which were obtained by him pursuant to law were used against him to convict him by the State of California which it as evidence of an unlawful operation.

Early in the trial in the Superior Court for the State of California for the County of Los Angeles at Long Beach, California, where the case was tried, the appellant that he could not be prosecuted by the state because he had already obtained his stamp from the Federal Government and that the State therefore had no right to prosecute him (R. 242-247).

BLURRED COPY

The appellant also raised the point that installation of the microphone in his home without any search warrant or other process and thereafter recording telephone conversations constituted a violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, in that the evidence was illegally obtained in violation of due process of law and also consisted of recordings of telephone conversations without the consent of either the receiver or the sender of the conversations. That these violated his rights under the federal constitution. (R. 244-247).

There was a standing objection throughout the trial based upon these contentions and although frequently the objections were repeated, the court overruled all objections and permitted the objection to go to all the proceedings. (R. 247).

It was also pointed out and made a part of the objection that wire tapping in the State of California is forbidden by Section 640 of the Penal Code and therefore the use of such wire tapping evidence constituted a violation of due process of law guaranteed by the Fourteenth Amendment.

Following the overruling of the objections, the court permitted conversations had over the wire recorded and heard over the telephone to be received in evidence against the appellant. (R. 249, et seq.). Thus telephone conversations which were heard over the installed wire recording are listed on page 363 of the Record:

BLEED THROUGH– POOR COPY

"A. I heard the sound of a 'phone being dialed. I heard Mr. Irvine's voice.

Q. Very well.

A. I heard Mr. Irvine say 'Can I speak to Jamok'? Then I heard Mr. Irvine say, 'In the first place you've got the horse down wrong.' Then I heard him say, 'In the 8th, 2 to win.' Then I heard him say 'King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger.' And I heard him say the word 'Fair Grounds.' And that is all of that particular conversation I recall at this time." (R. 363).

On December 11th he again recorded a phone conversation. (R. 364):

"I heard the sound of a 'phone being dialed and I heard Mr. Irvine say, 'How you doing, Tony?' Then there was a pause. Then I heard Mr. Irvine's voice say, 'Here's a parlay, 1-7, 2 across.' And '47-58-68-73-84-57-65-88.' Then '16 - 51 - 1 - across parlay.'"

Other conversations are recorded on pages 365, 366 and 367, 384. The conversation of December 29th:

"I heard Mr. Irvine—I heard a 'phone being dialed. I heard Mr. Irvine say, 'How're you doing, Pete?" I heard him say, 'Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross.' Then I heard him say, 'You made a mistake on Nelson. You paid him 7.20 for the $5

BLURRED COPY

he bet and that 7.20 was payment for only $2.' " (R. 384).

Other conversations are recorded on pages 385, 386 and 387.

On December 2nd, the police took a key-man to the home of Mr. Irvine to have a skeleton key made of the premises. (R. 642). They gave him nothing to guide him, just asked him to make a key and he pushed into the lock to locate the tumblers and then filed the key until it opened the lock. (R. 643). He made the key on the front porch of Irvine's home, but without Irvine's consent. (R. 643). The officers, Inspector Kennedy and Officer Hermansen, got the key the following day. (R. 644). They walked into the house through the key they stealthily got, looked around at papers and things. (R. 646, 647). They examined the papers in the house under fluorescent light. (R. 649). They demanded Irvine to come over and put his hands under the light; he walked over and put his hands underneath the ultra violet light. (R. 650, 651). There was a reaction on his hands when he put them underneath the light. There was a search made of the house (without any search warrant or any other process by the officers). (R. 653). In the house they found the government issued wagering stamp belonging to Morris Lippe. (R. 654). In the bedroom they saw a racing form and 46-sheets of paper and a little note book. (R. 655). In Mr. Irvine's room there was a book with a list of telephone numbers. They took pictures of the

BLEED THROUGH– POOR COPY

bedroom and pictures of the place. They searched the place and picked up books, papers and paraphernalia and several things which were introduced into evidence as Exhibits 22 et seq.

At the trial Leonard Hermansen related overhearing on a loud speaker and recording on his listening device a conversation. On December 8, 1951, on the telephone [Rep. Tr. p. 235, lines 11-22;] a telephone conversation on December 11, 1951, [Rep. Tr. p. 236, line 21 to p. 237, line 7;] December 12, 1951, [Rep. Tr. Vol. I, p. 241, lines 11-21;] December 13, 1951, [Rep. Tr. Vol. I, p. 243, line 7, to p. 244, line 2;] December 15, 1951, [Rep. Tr. Vol. I, p. 247, lines 7-17] December 17, 1951, [Rep. Tr. Vol. I, p. 248, line 25, to p. 249, line 8;] December 26, 1951, [Rep. Tr. Vol. I, p. 252, lines 15-24;] December 29, 1951, [Rep. Tr. Vol. I, p. 255, line 24, to p. 256, line 25;] December 29, 1951, [Rep. Tr. Vol. I, p. 256, lines 15-23;] December 29, 1951, [Rep. Tr. Vol. I, p. 257, line 16, to p. 258, line 18;] December 31, 1951, [Rep. Tr. Vol. I, p. 259, lines 3-18;] December 31, 1951 [Rep. Tr. Vol. I, p. 260, lines 1-7;] January 5, 1952, [Rep. Tr. Vol. I, p. 265, lines 14-23.]

The following witnesses related conversations alleged to have been overheard over the secretly installed listening device as emanating from Appellant's apartment:

Leonard Hermansen related a conversation he heard between Appellant and Pete Curti, [Rep.

BLURRED COPY

Tr. p. 229, line 11, to p. 231, line 15.] on December 11, 1951, a conversation between Appellant and Lippi [Rep. Tr. Vol. 1, p. 237, line 8 to p. 240, line 20;] on December 12, 1951, between Appellant and Lippi; [Rep. Tr. Vol. 1, p. 242, lines 15-19;] on December 17, 1951, between Appellant and Lippi; [Rep. Tr. Vol. I, p. 250, line 20, to p. 251, line 19;] on December 27, 1951, between Appellant and Pete Curti, [Rep. Tr. Vol. I, p. 254, line 20, to p. 255, line 4;] on December 31, 1951, a conversation in which he alleged he heard Pete Curti speak, [Rep. Tr. Vol. I, p. 260, line 18, to p. 261, line 12;] on January 2, 1952, a conversation between Appellant and Pete Curti, [Rep. Tr. Vol. I, p. 261, line 24, to p. 263, line 13.]

Jack D. Calori related a conversation he overheard through the listening device between Appellant and Morris Lippi emanating from the home of Appellant on December 4, 1951, [Rep. Tr. Vol. I, p. 110, line 20; p. 112, line 7; p. 115, line 26, to p. 116, line 8; p. 118, line 22, to p. 119, line 14.]

The microphone in the petitioner's house was removed on January 5th. (R. 667). A wagering stamp was found in a drawer of Irvine's home. (R. 668).

Frederick L. Good, a police officer of the City of Long Beach testified that on the night of January 5th, he took a special tax stamp, wagering, bearing the name apparently in typewriting "Irvine, Patrick E." and the address 3916 East Second Street, Long Beach, California, wager 28506, November '51 and then bearing a

BLEED THROUGH– POOR COPY

date, 11/5/51, which was marked as People's Exhibit 36. (R. 690). He said he took it from the wallet of the defendant, Patrick Irvine in the city jail on the night of January 5, (R. 690). There was also on the stamp tax the sum of $50.00. There was an objection to the introduction of the stamp in evidence because it was obtained in compliance with the federal law and therefore could not constitute an illegal act and can't be used to prove an illegal act of the state. (R. 691-692). This objection was overruled. (R. 692).

There was also introduced in evidence over objection the photostat of an original application, dated October 31, 1951, of Patrick E. Irvine to the Head of the Wage and Excise Tax Division of the United States Government, which constituted an application and report in a government report issued by the government regarding the application. (R. 854). The objection was overruled. (R. 855).

The court permitted in evidence all of the exhibits 63 to 74 from the records of the Office of the Collector of Internal Revenue. (R. 864). Exhibit 63 is the application of Patrick E. Irvine, the petitioner herein.

Objection to the installation of the microphone in the home of the appellant and the obtaining of testimony in that manner was objected to as a violation of due process of law (R. 922) and as using standards forbidden in the case of *Rochin v. People of the State of California* on motion for a new trial (R. 922) which motion was denied. (R. 922).

BLURRED COPY

The appellant was sentenced to one year in the county jail on Count II, (R. 946), six months in the county jail on Count III and the sentence to be suspended on the condition that he pay a fine of $1500.00 or to run consecutively with Count II; six months in the county jail on Count IV, suspended, and six months in the county jail on Count V, suspended. If the fine is not paid the six months is to run consecutively with the year's sentence. (R. 947).

The trial judge gave the following instructions to the jury.:

> "You are instructed that you are to consider all evidence which the Court has permitted to be introduced for your consideration, irrespective of the manner by which such evidence has been obtained, and to give to all of such evidence the weight to which you shall find it to be entitled.
>
> "The above instruction refers specifically to the testimony tending to prove that a microphone was placed in the home of defendant Patrick E. Irvine without the knowledge or consent of either the said Patrick E. Irvine or his wife, Mildred Irvine, and then connected by a wire to a distant point where it has been testified a recording machine and a loud speaker were installed and voices originating in the home of defendant Irvine were allegedly heard over the loud speaker and recorded on the recording machine. Such evidence (if you find that it was so obtained) is legally admissible in this State the same as any other competent evidence." (R. 42).

BLEED THROUGH– POOR COPY

"You are instructed that any trespass which you may find to have been committed upon the property of the defendants, or any of them, is not to enter into your deliberations in weighing the guilt or innocence of these defendants or to be considered by you in any manner whatsoever. That is a matter in which defendants have a separate remedy at law but which has no part in this trial. It is your duty to consider only the evidence which has been admitted for your consideration and determine from such evidence whether the guilt of defendants, or any of them, has been proved, and render your verdict accordingly." (R. 35).

"You are instructed that, effective November 1, 1951, Federal Laws require that every person who engages in the business of accepting wagers on horses or on any other sporting event, is required to make application to the Collector of Internal Revenue for a wagering stamp, which stamp must at all times be kept at the place of business of such person, or if he have no place of business, carried at all times on his person. Such person shall make monthly reports to the Collector of Internal Revenue showing the business he has done for the previous month and pay a tax on such amount, less any credit for so-called 'lay off' bets, that is, as defined by Federal law, bets received from another person engaged in accepting bets who has paid or reported such 'laid off' amounts himself.

Such Federal laws also provide that an individual may be primarily engaged in business as a salesman or merchant, for example, and if in addition to such regular business he accepts bets for

BLURRED COPY

profit, he shall be deemed to be engaged in the business of accepting wagers. Whether a person accepts bets for himself alone or for others, he is required to purchase the wagering stamp and pay the tax imposed.

However, none of the defendants is here being charged with violation of any Federal laws, but only for the specific crimes described and charged in the information filed by the District Attorney.

You are further instructed that the payment of any tax imposed by the Internal Revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of this State for carrying on the same within this State or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of this State. The special tax stamp is not a license or permit and affords no protection from prosecution for violation of any Federal or State Law." (R. 72, 73).

The appellant appealed to the District Court of Appeal for the State of California, Second Appellate Department, Division Two, which sustained the judgment of the trial court as against the contention that the rights of the petitioner under the Constitution of the United States had been violated and held that he had not been denied rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 968, 969).

BLEED THROUGH– POOR COPY

The petition for hearing in the Supreme Court of the State of California was denied on October 30th, 1952, in which the rights under the Federal Constitution were again reasserted, (R. 979, 980, 981), and the Supreme Court of California denied the hearing, two justices however were of the opinion that the petition for hearing should be granted—Justices Carter and Schauer. (R. 990).

## QUESTIONS PRESENTED

### I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed. Whether the trial judges instructions to the jury to the contrary was error.

### II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law to prove he was in an unlawful occupation and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

BLURRED COPY

III.

Whether the use of such compelled evidence grants Appellant statutory immunity under Section 334 California Penal Code.

IV.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

VI.

Whether the trial Judge's instructions to ignore the "trespass" and the instruction regarding the Federal Stamp tax were error.

BLEED THROUGH– POOR COPY

## SUMMARY OF PROPOSITION RELIED UPON

This case involves fundamental questions of constitutional law: namely,

A State may not through its criminal laws defeat and extinguish a federal tax passed by Congress and the opportunity to continue collecting such tax.

An Act of Congress imposing a tax cannot be impaired by State law or by State officers.

A defendant may not be tried and convicted in the State courts upon evidence obtained by compulsion of a Federal Statute, and thereafter introduced in evidence against an accused in the State court.

Compelled evidence under the Federal Statute within the meaning of the Fifth Amendment to the Constitution of the United States cannot be used in a state court without violating the Fourteenth Amendment to the Constitution of the United States. If such evidence is used in a state having an immunity statute such as Section 334 California Penal Code the effect is to grant statutory immunity.

Evidence obtained by burglarious entry of the police into the home of the appellant and by listening devices thereafter installed and recordings of telephone conversations through those listening devices and used in the trial of the appellant against him constitute such uncivilized standards as to violate the due process clause of the Fourteenth Amendment to the

BLURRED COPY

Constitution of the United States? They also violate Title 47, Section 605, F.C.C. Act, and Sec. 640 California Penal Code.[1]

Under the facts and circumstances of this case the appellant has been deprived of a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

## I.

Congress had a constitutional right to fix the wagering tax toward paying for the national debt. When Congress, by Title 26, Section 3265-3267 (65 Stat. 529), passed the act fixing a tax upon wagering throughout the United States the state could not interfere with or interrupt the federal tax by arresting the purchaser and terminating his use of the stamp. The person upon obtaining such a stamp and paying the tax was entitled to carry on wagering without interference from state authorities. A state may not interfere with a federally imposed tax by molesting and arresting the person paying such tax and thereby defeating the tax and its future collections. If it could do it in this case it could do it in any case.

Congress in fixing such a tax did so upon the theory that it was imposing a tax upon a legal operation—not an illegal operation.

---

[1] Use of connected listening or recording apparatus is an "interception" within the prohibition of the Communications Act.
*U. S. v. Polakoff*, 112 F. (2) 888; Cert. denied U. S. 653;
*U. S. v. Fallon*, 112 F. (2) 894 Cert. denied 311 U. S. 653.

BLEED THROUGH– POOR COPY

## II.

Where all persons engaged in the business of wagering are compelled by a law to make a declaration thereof and pay the tax and can be convicted upon the basis of evidence obtained by such compulsion under federal statutes, the use of such evidence in a state court constitutes a violation of due process of law guaranteed by the Fifth and incorporated into the Fourteenth Amendment to the Constitution of the United States.

## III.

Where the State of California used such compelled testimony it automatically granted statutory immunity under Section 334, California Penal Code. The defendant's testimony by means of his own voice, recorded on the secret listening devices and recording machines also gave him statutory immunity under Sec. 334 California Penal Code.

## IV.

The secret making of a key to appellant's home and burglarious entry into the home and installation of sound and recording devices and the taking of testimoney heard over such apparatus, including telephonic conversations, without the consent of the receiver or the sender and in violation of Section 640 of the California Penal Code and Article I, Section 19 of the California Constitution constitutes the obtaining of evidence by standards contrary to the fundamental

BLURRED COPY

principles of justice that inhere in our institutions. It represents a new low in law enforcement which the courts must reject to preserve its own purity. The use of such evidence requires a reversal of the judgments below.

## V.

The use of evidence obtained by methods used by the police in this case and the prosecutor, using illegally obtained and compelled evidence, violates "fair trial" guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is as shocking as was the obtaining and use of stomach pumped evidence rejected by this court in *Rochin v. California.*

## VI.

The Court should re-examine and reverse *Schwartz v. Texas.* Sec. 605 of Title 47 is not a rule of evidence for the courts but a general statute forbidding all interception and use of telephone conversation. California has a similar statute. See 640 California Penal Code.

BLEED THROUGH– POOR COPY

## ARGUMENT

### I.

**CONGRESS HAD A CONSTITUTIONAL RIGHT TO IMPOSE THE WAGERING TAX, ARTICLE I, SECTION 8, U. S. CONSTITUTION. McCRAY v. U. S., 195 U. S. 27. WHEN CONGRESS, BY TITLE 26, SECTION 3285, 3287, PASSED AN ACT FIXING A TAX UPON WAGERING THROUGHOUT THE UNITED STATES, THE PERSON UPON OBTAINING SUCH A STAMP AND PAYING THE TAX WAS ENTITLED TO CARRY ON WAGERING WITHOUT INTERFERENCE FROM STATE AUTHORITIES. A STATE MAY NOT INTERFERE WITH OR DEFEAT A FEDERALLY IMPOSED TAX BY MOLESTING AND ARRESTING THE PERSON PAYING SUCH TAX AND THEREBY DEFEATING THE TAX AND ITS FUTURE COLLECTIONS. CONGRESS IN FIXING SUCH A TAX DID SO UPON THE THEORY THAT IT WAS IMPOSING A TAX UPON A LEGAL OPERATION—NOT AN ILLEGAL OPERATION.**

On October 20th, 1951 the federal law regarding wagering stamps went into effect. On November 5th, the appellant pursuant to the commands of congress applied for and obtained such a wagering stamp. Had he failed to do so, he would have been guilty of a federal crime.

BLURRED COPY

It must be presumed that Congress intended to tax a lawful operation, and that it did so to collect money to pay the national debt.

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United State."

These purposes are very broad. The motive or purpose of Congress in levying the tax may not be inquired into by the courts.

> *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78, 1 Am. Cas. 561.

Having power to raise money to pay the debts of the United States, it of course follows that Congress has power to tax and make lawful operations that might even be deemed unlawful within the States. Since the rights are created for federal purposes a state may not though any of its agencies impair the federal tax. The United States has priority of the necessary consequence of the supremacy of the Laws of the United States on all subject to which the legislative power of Congress extends.

> *United States v. Fisher*, 2 Cranch. 358, 2 U. S. (L. Ed.) 304;
> *U. S. v. Darby*, 312 U. S. 100;
> *Opp Cotton Mill, Inc. v. Administrator*, 312 U. S. 144.

BLEED THROUGH– POOR COPY

No state may as an exercise of its own power lay any burden on the taxing power or impede the taxes imposed by the United States. (*Dobbin v. Erie County,* 16 Fed. 435, 10 U. S. (L. Ed.) 1022).

And see *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579; *Williams v. Callacega,* 57 U. S. (L. Ed.) 275; *Farmers, etc. Savings Bank v. Minnesota,* 232 U. S. 516, 58 L. Ed. 706; *Choctaw etc. Railroad Co. v. Harrison,* 235 U. S. 292, 59 L. Ed. 234.

The framers of the Constitution did not design to make the federal government dependent upon the states.

> *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579.

Nor are states allowed to defeat federally imposed taxes.

Exclusive jurisdiction is given to the federal government in this matter.

> *Yates v. Jones National Bank,* 206 U. S. 158, 51 L. Ed. 1002;
> *Easten v. Iowa,* 188 U. S. 220, 47 L. Ed. 452;
> *Cross v. North Carolina,* 132 U. S. 131, 33 L. Ed. 287;
> *In re Eno,* 54 Fed. 669;
> *U. S. v. Busbee,* 38 Fed. 99.

The priority given the United States cannot be impaired or superseded by state law. *U. S. v. Oklahoma,*

BLURRED COPY

261 U. S. 253, 260; *Illinois v. Campbell,* 329 U. S. 362, 370, 91 L. Ed. 355.

It is well settled in the case of banks that the power of Congress subjects these national banks to the paramount authority of the United States. That an attempt by a state to define their duties or control the conduct of their affair is absolutely void, and the only power of the states in respect thereto is only when it is specifically granted by Congress.

*Owensborough National Bank v. Owensborough,* 173 U. S. 664, 43 L. Ed. 850;
*Veazie Bank v. Fenno,* 8 Wall. 533, 19 U. S. (L. Ed.) 482;
*Farmers Etc. Nat'l Bank v. Erie,* 91 U. S. 29, 23 L. Ed. 196.

Once Congress has assumed to tax "wagering", nationally under its Constitutional power, a State may not interfere to diminish or defeat the tax without specific consent of Congress, which has not been given. There is no difference between this situation and federal taxation and jurisdiction regarding federal banks.

One who complies with the Federal Statute and obtains his wagering stamp may thereafter not be interfered with by the state authorities because it would thereafter defeat and impair the tax. Action by a state in the exercise of its police powers must, by virtue of the supremacy clause, Article VI, Clause 2, U. S. Constitution, give way to the act of Congress. *Brod-*

BLEED THROUGH– POOR COPY

*erick v. Rosner,* 294 U. S. 629; 79 L. Ed. 1100; *Morris v. Jones,* 329 U. S. 553; 91 L. Ed. 497.

The power of the state "may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." *Hill v. Florida,* 325 U. S. 538, 542; 89 L. Ed. 1782, 1785; *Maurer v. Hamilton,* 309 U. S. 598; *Bethlehem Steel Co. v. N. Y. Labor Rel. Bd.,* 330 U. S. 773; 91 L. Ed. 1245-6; and see *Feldman v. U. S.,* 322 U. S. 490-3.

## II.

## A.

**WHERE ALL PERSONS ENGAGED IN THE BUSINESS OF WAGERING ARE COMPELLED BY A LAW TO MAKE A DECLARATION THEREOF AND PAY THE TAX AND CAN BE CONVICTED UPON THE BASIS OF EVIDENCE OBTAINED BY SUCH COMPULSION UNDER FEDERAL STATUTES, THE USE OF SUCH EVIDENCE IN A STATE COURT CONSTITUES A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.**

## B.

**BY ITS USE STATUTORY IMMUNITY IS GRANTED UNDER SECTION 334 CALIFORNIA PENAL CODE.**

BLURRED COPY

A.

The federal statute regarding "wagering tax and stamps" was compulsory. The appellant was compelled to apply or subjected himself to prosecution, conviction and imprisonment by a federal court, Sec. 3287, Title 26, upon failure to do so. His application for the tax stamp (Exhibit 63) and the stamp which the government issued to him by reason of such compulsion could not thereafter legally be used in evidence against him in a state court. *Brown v. Walker,* 161 U. S. 591; 40 L. Ed. 819[1]; *Jack v. Kansas,* 199 U. S. 372; 50 L. Ed. 234; *Feldman v. U. S.,* 322 U. S. 487.

In *Feldman v. United States,* 322 U. S. 487; 88 L. Ed. 1408, this court held that a state statute compelling testimony in a bankruptcy proceeding, that if the statute had been a federal statute that the testimony could not be used. Here we have the reverse situation. The state used evidence which the government compelled. We have a federal statute which makes compulsory the application for a stamp and the issuance of a stamp under penalty of imprisonment. The use of such compelled testimony in the state court thereafter violated petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It is offensive to the common and fundamental ideas of fairness and right. *Betts v.*

[1]In *Brown v. Walker,* the Supreme Court thought the likelihood that State prosecutors would use testimony compelled by the Federal Government so "improbable that no reasonable man would suffer it to influence his conduct." 161 U. S. 606-608. But it did happen here.

BLEED THROUGH– POOR COPY

*Brady*, 316 U. S. 455, 462; *Feldman v. U. S.*, 322 U. S. 487; *Boyd v. U. S.*, 116 U. S. 616.

In *Boyd v. United States*, 116 U. S. 616, this court condemns the use of evidence unlawfully seized and testimony compelled against an accused as violating those fundamental standards of liberty and justice that inhere in our institutions.

*Feldman v. U. S.*, 322 U. S. 487;
*Hebert v. Louisiana*, 272 U. S. 312;
*Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166;
*Malinski v. N. Y.*, 324 U. S. 401;
*Rochin v. California*, 342 U. S. 165;
*Harris v. U. S.*, 331 U. S. 158.

B.

Use of this testimony resulted in granting statutory immunity under Sec. 334 California Penal Code.

Section 334 of the Penal Code of the State of California provides as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The instant testimony was obtained from the defendand himself by a federal agency; in the strict sense of

BLURRED COPY

the word the documents were "testimony" which the appellant gave to a federal agency under the compulsion of the federal statute.

If used thereafter in the state court, it either violated due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States or immunity attached under Section 334 of the Penal Code of the State of California, and the judgment herein is void, and the defendant is entitled to his discharge.

Having used the compelled testimony against him the defendant thereby received statutory immunity under Section 334 California Penal Code and is entitled to his discharge.

*Section 334 California Penal Code;*
*Smith v. U. S.,* 337 U. S. 137; 93 L. Ed. 1264;
*Ex parte Clark,* 103 Cal. 352;
*People v. Knowles,* 27 Cal. App. 498;
*People v. Fryer,* 175 Cal. 785;
*Ex parte Cohen,* 104 Cal. 524;
*Counselman v. Hitchcock,* 142 U. S. 547.

Section 334 California Penal Code is designed to afford immunity to a person for his testimony in gambling or wagering matters similar to the Compulsory Testimony Act of Feb. 11, 1893; 49 U.S.C.A. Sec. 46 F.C.A. Title 49 Sec. 46.

See:

*Counselman v. Hitchcock,* 142 U. S. 547; 35 L. Ed. 1110;

BLEED THROUGH– POOR COPY

*Brown v. Walker,* 161 U. S. 591; 40 L. Ed. 819;
*Glickstein v. U. S.,* 222 U. S. 139; 56 L. Ed. 128;
*Burrell v. Montana,* 194 U. S. 572; 48 L. Ed. 1122;
*Jack v. Kansas,* 199 U. S. 372; 50 L. Ed. 234;
*Ballman v. Fagin,* 200 U. S. 186; 50 L. Ed. 433;
*Hale v. Henkel,* 201 U. S. 43; 50 L. Ed. 652;
*Heike v. U. S.,* 217 U. S. 423; 54 L. Ed. 821;
*Smith v. U. S.,* 337 U. S. 137; 93 L. Ed. 1264.
*Ex parte Cohen,* 104 Cal. 524;
*Ex parte Clark,* 103 Cal. 352;
*Rittenhouse v. Superior Court,* 20 Cal. (2) 71;
*McLain v. Superior Court,* 99 Cal. App. (2) 274.

It was not only the application for the stamp tax which he made out and signed under statutory compulsion that constituted the compelled testimony.

It was also all of his statements made over the telephone and in his house that were recorded and introduced into evidence that constitute the testimony of gaming of which he was convicted.

Had the state placed Irvine on the stand to testify directly as to all the recorded conversations there could be no question about his statutory immunity.

Section 334, California Penal Code;
*Ex parte Cohen,* 104 Cal. 524;
*Ex parte Clark,* 103 Cal. 352;

BLURRED COPY

*Peo. v. McCormick*, 102 Cal. App. (2) 954, 228 P. (2) 349;
*Rittenhouse v. Superior Court*, 20 Cal. (2) 71;
*McLain v. Superior Court*, 99 Cal. App. (2) 274; 221 P. (2) 300.

The fact that his testimony was secured indirectly and involuntarily by surreptitious means and listening and recording devices does not remove the statutory immunity. The testimony was his own voice concerning the offense of gaming. Sec. 334 California Penal Code.

In *Zap v. U. S.*, 328 U. S. 624; 90 L. Ed. 1477 this court held that where officers seized a check and used it in evidence there was only a technical difference since they could have made a copy and used the copy. Here the officers through new and scientific devices copied and recorded Appellant's voice and used it in evidence. It was his testimony regarding the offense of gaming. Had he been called to the stand directly to testify immunity would have resulted.

Section 334, California Penal Code;
*Ex parte Cohen*, 104 Cal. 524;
*Ex parte Clark*, 103 Cal. 352.

The fact that it was obtained outside of court through devious and tricky methods does not remove the statutory immunity once it is used.

*Smith v. U. S.*, 337 U. S. 137;
*Rochin v. California*, 342 U. S. 165; 96 L. Ed. 183;

BLEED THROUGH– POOR COPY

*Watts v. Indiana,* 338 U. S. 49; 93 L. Ed. 1801;
*Wolf v. Colorado,* 338 U. S. 25; 93 L. Ed. 1782;
*Zap v. U. S.,* 328 U. S. 624; 90 L. Ed. 1477;
*U. S. v. Monia,* 317 U. S. 424.

In *Smith v. U. S.,* 337 U. S. 137, 146; 93 L. Ed. 1264, 1271 the court discusses statutory immunity at length.

And see also:

*U. S. v. Monia,* 317 U. S. 424;
*Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 113; 71 L. Ed. 560, 566;
*Ex parte Cohen,* 104 Cal. 524;
*Ex parte Clark,* 103 Cal. 352;
*Peo. v. McCormick,* 102 Cal. App. (2) Supp. 954; 228 Pac. (2) 349;
*McLain v. Superior Court,* 99 Cal. App. (2) 274; 221 (2) 323;
*Rittenhouse v. Superior Court,* 20 Cal. (2) 71.

BLURRED COPY

## III.

**THE SECRET MAKING OF A KEY TO APPELLANT'S HOME AND BURGLARIOUS ENTRY INTO THE HOME AND INSTALLATION OF SOUND AND RECORDING DEVICES AND THE TAKING OF TESTIMONY HEARD OVER SUCH APPARATUS, INCLUDING TELEPHONIC CONVERSATIONS, WITHOUT THE CONSENT OF THE RECEIVER OR THE SENDER CONSTITUTES THE OBTAINING OF EVIDENCE BY STANDARDS CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF JUSTICE THAT INHERE IN OUR INSTITUTIONS. THE COURTS MUST PRESERVE THEIR OWN PURITY BY EXCLUDING SUCH EVIDENCE. THE USE OF SUCH EVIDENCE REQUIRES THE REVERSAL OF THE JUDGMENTS BELOW.**

The agents of the state secretly made a key to appellant's houses; they burglariously entered the home to conduct an operation in violation of California law penalizing wire tapping. (Sec. 640 Penal Code of California.) The use of such evidence obtained by these methods is so shocking as to violate the fundamental principles of justice that inhere in our institutions.

*Rochin v. California,* 342 U. S. 165;
*Betts v. Brady,* 316 U. S. 455, 462, 473; 86 L. Ed. 1595, 1601, 1607;
*Brown v. Walker,* 161 U. S. 591; 40 L. Ed. 819;
*Boyd v. U. S.,* 116 U. S. 616;

BLEED THROUGH– POOR COPY

*Byars v. U. S.*, 273 U. S. 28;
*McNabb v. U. S.*, 318 U. S. 332; 87 L. Ed. 819;
*Feldman v. U. S.*, 322 U. S. 487;
*On Lee v. U. S.*, 343 U. S. 747, 96 L. Ed. 1270.

This Court in discussing lawless enforcement of the law in effect in *United States v. Trupiano*, 334 U. S. 369 set out at page 705,

> "In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess an attachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusion upon the private lives of the individuals the framers of the Fourth Amendment required that hearers to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

California's Article 1, Sec. 19 is virtually in the language of the Fourth Amendment.

No search warrant or other process was obtained to enter the private home of Mr. Irvine but a burglary was actually committed by the making of the key and the entering for the purpose of tapping wires—a felony. Burglary in California consists of any entry with intent to commit a felony. Section 459 California Penal Code.

In *Gouled v. The United States*, 255 U. S. 296, this court had occasion to specifically rule upon and pass

BLURRED COPY

upon the question of the admission of evidence obtained surreptitiously and by fraud on the part of a government witness and in that case it was distinctly held that such evidence was obtained by an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the evidence was a violation of the Fifth Amendment.

In *Lisenba v. California,* 314 U. S. 166 this court held that violation of due process of law occurs if there is fraud used in the obtaining of evidence and that its use is inadmissible and in violation of the Fourteenth Amendment.

In the *Gouled* case this court said:

> "It would not be possible to add the emphasis which the framers of our Constitution and this court (in *Boyd v. United States,* 116 U. S. 616, in *Weeks v. U. S.,* 232, U. S. 383 and in *Silver Thorne Lumber Company v. United States,* 251 U. S. 385) had declared the importance to political liberty and to the welfare of our country of due observation of the right to guaranteed by the Constitution under these Amendments. The effect of the decision as cited are that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property that they are to be regarded as the very essence of Constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen, the right to trial by jury, to the

BLEED THROUGH– POOR COPY

writ of *Habeas Corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them by imperceptible practice of courts by well intentioned but mistakenly over zealous executive officers."

Again on page 305 the Court said:

"It is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force and/or coercion."

In *Goldman v. United States,* 316 U. S. 129, 134 this court indicated that if a dictaphone were placed in the office of one of the defendants by trespass and had worked and had been the means of gathering the evidence offered by the Government, this evidence would have been inadmissible. The Court points out that in its opinion through Chief Justice Taft on at least specific instances that there was no intrusion, invasion or trespass upon the physical premises of the defendant, and in the Solicitor's General Brief in the case of *Olmstead v. United States,* 277 U. S. 438, it was pointed out that if there had been an actual unlawful entry into the house the Fourth Amendment would have been violated.

While our contention is under the Fourteenth Amendment still where the provisions of California's

BLURRED COPY

Constitution are like those of the Constitution of the United States, then the two must be construed alike in their application to the State of California.

In *United States v. Jesse Jeffers, Jr.,* 342 U. S. 48, the prevailing opinion said in discussing the entry by officers to make the search for the sole purpose of seizing contraband . . . "the officers not only proceeded without a warrant or other legal authority but their intrusion was conducted surreptitiously and by means denounced as criminal."

In *Neuslein v. the District of Columbia,* 115 (2) 699, Chief Justice Vinson then a Circuit Judge writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while there upon the premises obtained certain evidence through their power of observation and hearing, they had conducted an illegal search and seizure. In *Silverthorn Lumber Company v. United States,* 251 U. S. 385 this court refused to allow Government agents to raid a defendant's office and study the papers obtained in the raid, copy them, then use the knowledge that it had gained to call upon the owners in a more regular form to produce them.

Justice Holmes rejected for once and all the argument that the protection of the Constitution covers the physical possession but not any of the advantages the government can obtain over the object of its pursuit by doing the forbidden act.

BLEED THROUGH– POOR COPY

In *Zap v. United States,* 328 U. S. 624 this court overruled by a 4 to 3 vote the objections to the unlawful search and seizure because the officers "were not trespassers. They did not obtain access by force, fraud, or trickery. The knowledge they obtained concerned the petitioners' conduct under contract for the government was lawfully obtained."

In the instant case the police ofifcers used force, fraud, and trickery. They forcefully entered the defendant's premises with the keys surreptitiously made. They fraudulently tapped his telephone wires and they used fraud and trickery to obtain powder upon his hand.

In *District of Columbia v. Little,* 178 (2d) 13, 18, the Appellate Court was affirmed, 339 U. S. 1. That court held that due process of law forbade inspection of a home.

And see Frank's dissenting opinion in *United States v. On Lee* in the second circuit 193 (2) 306, and see *People v. Dent,* 371 Illinois 33, 19 N. E. (2) 10, 20. See also *Bramstedt,* "Dictatorship and Police Power in 1945," page 144.

Surely there can be no double standard of morality in the matter of fundamental Constitutional rights. The same fundamental morals that govern the Fourth Amendment to the Constitution of the United States govern Article I, Section 19 of the Constitution of California in its application to the question of whether due process of law has been violated under the Fourteenth

BLURRED COPY

Amendment to the Constitution of the United States; furthermore Congress in passing Title 47, Section 605 has made its application to all states and all persons. (*Nardone v. U. S.*, 302 U. S. 308; U. S. 247 P. (2) 702.) Here the police officers obtained the information to divulge and publish its existence and contents for their benefit and for the benefit of the state in its prosecution. This is forbidden by Title 47, Section 605. The use of evidence obtained by methods used by the police in this case by the prosecutor illegally obtained and compelled evidence violated fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Even in criminal prosecutions in the United States of America, the Fourteenth Amendment guarantees fair trial—a sporting man's idea of fair conduct of the case.

This Court held that evidence obtained by force, fraud, or trickery is illegally obtained. This Court rejected its use as a violation of the Fourteenth Amendment to the Constitution of the United States.

*Chambers v. Florida*, 309 U. S. 227;
*White v. Texas*, 310 U. S. 530;
*Ashcraft v. Tennessee*, 327 U. S. 274, 90 L. Ed. 667;
*Rochin v. California*, 342 U. S. 165;
*Olmstead v. United States*, 277 U. S. 438;
*Sorrells v. United States*, 287 U. S. 435.

BLEED THROUGH– POOR COPY

In *Rochin v. California, supra,* the officers pumped the stomach of the accused. In this case they burglarized his house. They had a man make a key to the house surreptitiously while the owner was away. Then they entered the house for the purpose of violating Section 640 of the Penal Code of the State of California, to-wit, tapping phones and telegraph wires. They faked an arrest and then they spread powder upon the documents and books and papers of another man. Then they broke into the house without any warrant and compelled the appellant and defendant to exhibit his hands to them.

To permit the use of this kind of evidence is to condone burglary and other lawless tactics and "dirty business" on the part of the officers, see *On Lee v. U. S.,* 343 U. S. 747, 96 L. Ed. 1270 and *Schwartz v. Texas,* 21 L. W. 4055, and would give judicial sanction to receiving stolen property and making use of it when done by officers in the name of law enforcement.

In *Sorrells v. United States,* 287 U. S. 435, this court said: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is a province of the court and the court alone to protect itself and the government from the prostitution of the criminal law."

And, in *Olmstead v. United States,* 277 U. S. 438, 484, Justice Brandeis said, "Our government is the potent, the omnipresent, teacher, for good or for ill, it teaches the whole people by its example." Are we

BLURRED COPY

then going to permit such lawless practices to receive the approval of the Supreme Court of the United States, or is this court going to hold that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States forbids such practices as this?

*Chambers v. Florida,* 309 U. S. 227;
*Rochin v. California,* 342 U. S. 165;
*Sorrells v. United States,* 287 U. S. 435.

To paraphrase the language of this Court in *Rochin v. California, supra,*

> The "conduct (in this case burglary and other misconduct) . . . forbiddenly . . . "the judgment before us would be to afford burglary and other lawless conduct of the officers of the law the cloak of law. Nothing would be more calculated to discredit law and thereby to utilize the temper of a society." (342 U. S. 165.)

Such conduct on the part of the officers is "so offensive to human dignity in securing evidence from a suspect as is revealed by this record" as to be forbidden by the Fourteenth Amendment to the Constitution of the United States and its use ostracized.

BLEED THROUGH– POOR COPY

## IV.

## CONGRESS BANNED USE OF INTERCEPTED TELEPHONE COMMUNICATIONS. SCHWARTZ v. TEXAS SHOULD BE OVERRULED.

Congress has outlawed wire tapping and the use of information obtained over the telephone without the consent of sender or receiver Communications Act, Title 47, Sec. 605, U. S. Code; *Nardine v. U. S.,* 302 U. S. 379; 82 L. Ed. 314; *Nardone v. U. S.,* 308 U. S. 338, 84 L.Ed. 307; *Westin The Wire Tapping Problem,* 52 Col. L. Rev. 165; *Olmstead v. U. S.,* 277 U. S. 438; 72 L. Ed. 944; *Goldman v. U. S.,* 316 U. S. 129, 86 L. Ed. 1322. California has a state statute forbidding it and making its use a felony, Section 640 California Penal Code.

In the present case neither sender nor receiver authorized the use of the numerous conversations overheard and used in evidence. On the facts of this case *Schwartz v. Texas,* 73 Sup. Ct. (2d) 232, should be distinguished or overruled. Only Congress can remove the ban it has placed in use anywhere if intercepted telephone communications. Title 47, Section 605, U. S. Code. It is said that "bad cases" make "bad laws". The *Schwartz* case was such a "bad" case. This one is not—it is a "bookie case". The moral turpitude has been taken out of bookmaking by legislative permission to make bets at race tracks.

But Congress and California in making it a felony and in forbidding use of telephonic communications

BLURRED COPY

were not formulating a rule of evidence. It was forbidding all use of intercepted telephonic communications whether out of or in court. Forbidding its use as evidence was but a small part of the protection placed upon the instrumentalities of communication.

Section 605 Title 47 forbids *any person* who "having received such intercepted communication, or having become acquainted with the contents, substance, purpose, effect a meaning of the same or any parts thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

We can conceive of no clearer language or mandate. No Congressman needs to be psychoanlyzed to his intended meaning. Because the result may have been right in *Schwartz v. Texas,* is no sign the erroneous doctrine shoud be reaffirmed. Clearly Congress forbade the use of intercepted telephone conversations everywhere.

Congress did not lack language to exempt State courts from the general law. If such conversations can be used in a criminal case it can be used in a divorce case or in a stock exchange. The scope is limitless. But Congress has forbidden any use anywhere and only Congress should change it, not the courts.

BLEED THROUGH– POOR COPY

This court has not hesitated to do so on recommendation of its previous decisions.

California has also made wire tapping a felony (Sec. 640 California Penal Code.)

The liberty of the individual in the use of the telephone has been given Congressional protection. Be it the voice of the business man in a multi-million dollar deal, the conversations of justices of the Supreme Court in a confidential discussion of a case, the voice of the President and his attorney-general, or the placing of a bet over the telephone—each and all may not be divulged without the consent of the sender—so Congress has said. The fact that the place is a court room rather than the inside of a stock exchange or a race track does not alter the Congressional ban.

*Schwartz v. Texas* should be overruled.

## V.

Setting up a fake road block, putting fluorescent powder on papers in the car illegally and falsely stopped, then entering appellant Irvine's home without a warrant, compelling him to submit to an examination under fluorescent light, and using this evidence against him shocks the conscience; offends a sense of justice and runs counter to the decencies of civilized conduct.

*Rochin v. California,* 343 U. S. 175.

BLURRED COPY

There was no legal warrant or other right for the police to set up a fake road block in order to rummage through papers to impregnate them with flourescent powder. The right to stop and search a car may be made only as an incident to a lawful arrest.

*Marron v. U. S.*, 275 U. S. 192, 72 L. Ed. 230.

Rummaging through the car and the papers for the purpose of putting flourescent powder on them was another illegal act. Later the officers entered appellant's home without a warrant and forced him to submit to tests under a fluoroscope; then searched for and seized a wagering stamp and other evidence without appellant's consent.

We respectfully pray for reversal of the judgments below and an order of dismissal.

Respectfully submitted,

MORRIS LAVINE,

BLEED THROUGH– POOR COPY

BLURRED COPY

BLEED THROUGH- POOR COPY

ILE COPY

FILED
DEC 4 19
HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

---

No. 12

---

PATRICK E. IRVINE, *Appellant*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

---

## CLOSING BRIEF

---

MORRIS LAVINE,
620 Bartlett Bldg.,
215 West 7th St.,
Los Angeles 14, Calif.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLEED THROUGH- POOR COPY

## TABLE OF CONTENTS


Page

I. The Case Must Be Reversed Under the Doctrine of the Rochin Case, 342 U. S. 165 (No. 83, Oct. Term, 1951) ..... 1

II. The Wagering Stamp Tax Act and Reports Secured Pursuant Thereto Are Unconstitutionally Construed and Applied in This Case ..... 7

III. The Gambler's Occupation Stamp Tax Is Contrary to the Fifth, Tenth and Fourteenth Amendments to the Constitution ..... 11


### Table of Cases


Ashcraft v. Tennessee, 322 U. S. 143 ..... 9
Ballman v. Fagin, 200 U. S. 186 ..... 10
Boyd v. U. S., 116 U. S. 616, 630 ..... 1, 8
Brown v. Mississippi, 297 U. S. 278 ..... 9
Brown v. Walker, 161 U. S. 591 ..... 9, 10
Chambers v. Florida, 309 U. S. 227 ..... 9
Counselman v. Hitchcock, 142 U. S. 547 ..... 10
Gallegos v. Nebraska, 342 U. S. 355 ..... 9
Goldman, 316 U. S. 129 ..... 12
Grosjean v. American Press Co., 297 U. S. 233, 245-250 ..... 1, 3, 10, 11
Herbert v. Louisiana, 272 U. S. 312, 316 ..... 1, 4, 5
Jack v. Kansas, 179 U. S. 372 ..... 10
Kerby v. Hal Roach Studios, 53 Cal. App. (2) 207 .... 3
Lisenba v. California, 314 U. S. 166 ..... 1, 9
Lustig v. U. S., 338 U. S. 74 ..... 10
Malenski v. N. Y., 324 U. S. 401 ..... 1, 9
McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 100, 2 S.E. (2) 810 ..... 3
McDonald v. U. S. 335 U. S. 451 ..... 6
McNabb v. U. S., 318 U. S. 332 ..... 10
Melvin v. Reid, 112 Cal. App. 285 ..... 3
People v. Coppla, 100 Cal. App. (2) 766, 768 ..... 6
People v. Kelley, 22 Cal. (2) 169 ..... 6
People v. Onofrio, 65 Cal. App. (2) 585 ..... 6
People v. Sumner, 117 Cal. App. (2) 40 ..... 6


BLURRED COPY

Page

Rochin v. California, 342 U. S. 165 ..... 1, 4
Silverthorne Lumber Co. v. U. S., 251 U.S. 385, 392 ... 7
U. S. v. Butler, 297 U. S. 1 ..... 11
U. S. v. Carignan, 342 U. S. 36 ..... 10
U. S. v. Constantine, 296 U. S. 287 ..... 11
U. S. v. Di Re, 332 U. S. 581, 582 ..... 6
U. S. v. Kahriger, 73 Sup. Ct. 510 .....7, 10, 11, 12
U. S. v. Saline Bank, 1 Pet. 100 (L. ed.) 69 ..... 10
Watts v. Indiana, 338 U. S. 49, 55 ..... 7
Wolf v. Colorado, 338 U. S. 25, 28 .....3, 4, 5, 6
White v. Texas, 310 U. S. 530 ..... 9

Louis Brandeis, Right of Privacy, 4 Harvard Law Review 196 ..... 12
California Penal Code:
Section 182 ..... 5
Section 640 .....5, 12
Section 653h ..... 5
Sections 1323 et seq. (Chap. 3) ..... 5
Constitution of Colorado, Article 2, Section 7 ..... 3
Corpus Juris, Section 310 ..... 7
Fed. Rules Cr. Pr. 26, 18 U.S.C.A., Rule 5a ..... 10
Gambler's Occupational Tax Act, Title 26, Secs. 3285-3298, U. S. Code ..... 7

BLEED THROUGH– POOR COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

---

No. 12

---

PATRICK E. IRVINE, *Appellant*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

---

## CLOSING BRIEF

---

### I

**This Case Must Be Reversed Under the Doctrine of the Rochin Case, 342 U. S. 165 (No. 83, Oct. Term, 1951)**

As Mr. Justice Reed pointed out in oral argument, reversal of this case is sought on the basis of conduct held in *Rochin* v. *California* to offend "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

*Rochin* v. *California*, 342 U. S. 165
*Hebert* v. *Louisiana*, 272 U. S. 312, 316
*Grosjean* v. *American Press Co.*, 297 U. S. 233
*Lisenba* v. *California*, 314 U. S. 166
*Malenski* v. *N.Y.*, 324 U. S. 401.

BLURRED COPY

Can this court say that the following conduct invading "the sanctity of a man's home and the privacies of life" (116 U. S. 630) is not contrary to the fundamental principles of *liberty*?

1. Secretly making by the police employed locksmith of a key to one's private home and bedroom. (Rep. Tr. 516-518)

2. Climbing by the police technician of the roof of one's home, drilling by him of a hole into it and clandestinely extending electronic wires through it into one's private quarters and bedroom to install hidden sound recording device, to listen in on one's most private and intimate life. (Rep. Tr. 31-34)

3. Stringing wires from the home to a garage three-quarters of a block away where the secret police attach a wire recorder and a loud speaker to listen and record around the clock. (Rep. Tr. 32-34, 42, 52)

4. For the secret police to listen in on telephone and personal conversations, on husband and wife activities and record them on a wire recorder and hear them through a loud speaker for a whole month. (Rep. Tr. 147-148, 35, 236-261)

5. For the secret police to conspire in violation of Section 182 of the California Penal Code to violate Section 653h in carrying on these activities without authority and approval of the Chief of Police or District Attorney, to install a dictaphone or use the same in this house. (Rep. Tr. 73-80; 516-518; 34)

6. For the secret police to conspire to and to commit burglary by entering the premises with a secretly made key to obtain information regarding telephone conversations in violation of Section 640 of the Penal Code of California. (Rep. Tr. 31-32; 516-518)

BLEED THROUGH– POOR COPY

7. To break into the home without a search warrant to arrest the defendant and seize books, papers, tax stamps. (Rep. Tr. 410)

8. To put fluorescent powder on books and papers and force the defendant to exhibit his hands under ultraviolet light in his home to incriminate himself. (Rep. Tr. 414-16; 524-525, 710)

"The word 'liberty' contained in that (Fourteenth) Amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of *all his faculties as well*"—*Grosjean* v. *American Press Co.*, 297 U. S. 244.

A right of privacy is a right derived from natural law guaranteed by the Constitution of the United States. (1939) *McDaniel* v. *Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 100, 2 S.E. (2) 810. *Melvin* v. *Reid*, 112 Cal. App. 285. *Kerby* v. *Hal Roach Studios*, 53 Cal. App. (2) 207. Louis Brandeis in 4 Harvard Law Review 193.

That right includes the right of privacy in one's home—in one's bedroom. Even *Wolf* v. *Colorado* says that an invasion of such privacy is forbidden under the Fourteenth Amendment and will be protected under it against arbitrary intrusion.

*Wolf* v. *Colorado* showed no such shocking misconduct as is betrayed by this record. In the *Colorado* case Dr. Wolf was arrested for assisting an abortion. The name of the woman aborted was contained in two day books on the doctor's desk, which became Exhibits "A" and "C" in the case. The arresting officer took the books without any search warrant allegedly in violation of Article 2, Section 7 of Colorado's Constitution. (See Record No. 17, January Term, 1948, pages 5, 11.) Motion to quash and for directed verdict were based upon violation of both the Colorado Constitution and the Fourth and Fifth Amendments to the U. S. Constitution (Page 17 of Record in *Wolf* case). It

BLURRED COPY

was contended that this search and seizure were incidents to the lawful arrest of Wolf.

This is a far different situation than the facts of our case, as set out above. In the *Wolf* case no home was burglarized, no key was made, no roof was drilled, no wires were strung, no private or intimate conversations between the doctor and his patients or his wife were listened in on and recorded for a month, by secret police unauthorized by the Chief of Police or District Attorney. The doctor was not forced to exhibit his hands under ultraviolet light to incriminate himself.

Our case, like Rochin, is obnoxious to those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions"—hence contrary to the 14th Amendment. It "shocks the conscience" and runs counter to "the decencies of civilized conduct."

*Rochin* v. *California*, 342 U. S. 165
*Hebert* v. *Louisiana*, 272 U. S. 312, 316.

Examination of the two State's brief—the one in this case and the other in the *Rochin* case bear striking parallels. The same untenable arguments are put forth in both. The fact that the argument failed to convince this court in the *Rochin* case against conduct shocking to a civilized and decent society has not lessened it in re-presenting the argument, and in similar form to justify the unconstitutional invasion of privacy exhibited by the record and numerous tape recordings in this case. The secret police of totalitarian countries could do no more.

Even in the *Wolf* case this court said:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforcible against the States through the Due Process Clause." *Wolf* v. *Colorado*, 338 U. S. 25, 28.

BLEED THROUGH– POOR COPY

The arbitrary intrusion by the secret police in our case was forcefully brought out by Mr. Chief Justice Warren when he read Section 653h of the California Penal Code[1] making it a crime for a police officer to install a dictaphone *without* the consent of the chief of police or district attorney. On questioning by the chief justice, Mr. Clarence Linn, assistant attorney general of California, admitted that no such consent or permission was received. Hence these officers were engaged in a conspiracy (Sec. 182 Penal Code of California) to violate both Sections 640 and Sections 653h California Penal Code in the arbitrary intrusion of appellant's home.

If "the constable blundered" he did it secretly, wilfully and deliberately and stayed there a month to look and listen and record without authority of his chief superior, or the district attorney, and without due or any process,—contrary to liberty and justice that lie at the base of our institutions. (*Hebert* v. *Louisiana*, 272 U.S. 312, 316)

California, like the United States, and most states, has provisions for search warrants. (Chapter 3 California Penal Code; Sections 1323 et seq.) The right and reasonableness of the search is then determined by a magistrate, not the police, and if the magistrate determined that there was reasonable cause the search would be authorized, not "arbitrary intrusion" which the *Wolf* case says is forbidden under the 14th Amendment.

---

[1] Dictograph. Installation of. Any person who, without consent of the owner, lessee or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable or other building, tent, vessel, railroad car, vehicle, mine, or any underground portion thereof is guilty of a misdemeanor; provided that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals. (Sec. 653h, Calif. Penal Code.)

BLURRED COPY

Respondent says "On November 5, 1951 Irvine voluntarily caused to be filed in the office of the Collector of Internal Revenue at Los Angeles a "Special Tax Return and Application for Registry-Wagering." People's Exh. 63 (Resp. Br. 62-63)

> "By filing these returns Irvine and his employee Lippe served notice on the law enforcement agencies that they intended to engage in the commission of a felony in Los Angeles County, and in all likelihood at the premises at 3916 E. Second street, Long Beach."

If this is correct, the police were then in a position to obtain a search warrant as authorized and supervised by a magistrate in accordance with law. Search warrants are designed to protect the Constitutional requirement. *McDonald* v. *U. S.*, 335 U. S. 451; *Wolf* v. *Colorado*, 338 U. S. 25. And if Irvine was the bookmaker, Mr. Linn tried to paint him he had to have a "book" on his premises in which bets were being recorded daily—it did not take a whole month of intimate listings. Our constitution condemns a "too permeating police surveillance • • • (as) a greater danger to a free people than the escape of some criminals from justice, *U. S.* v. *Di Re*, 332 U. S., 581, 582.

"Bookmaking" says the District Court of Appeal of the State of California, "is the making of a book of bets." *People* v. *Coppla*, 100 Cal. App. (2) 766, 768; *People* v. *Sumner*, 117 Cal. App. (2) 40. If Irvine was bookmaking as charged in Count II of the information, or keeping and occupying a premise for the purpose of recording and registering bets, as charged in Count III, or making or forwarding them, as charged in Counts IV and V his arrest was possible on any day, since he had to have the "book", the paper, or papers, and the paraphernalia usually ascribed to bookmakers—pencil, pad with numbers indicating races and bets made thereon and recording of bets. See *People* v. *Kelley*, 22 Cal. (2) 169; *People* v. *Onofrio*, 65 Cal. App. (2) 585—both bookmaking cases.

BLEED THROUGH– POOR COPY

We cannot complain of the acts of spying, invasion of privacy, and ordered liberty in totalitarian countries, if we set this case up as an example of "ordered liberty" and allow the procedure used here to receive the approval of this court as our basic concept of ordered liberty.

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that * * * evidence so acquired * * * shall not be used at all." Otherwise the prohibition is a mere "form of words." *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385, 392; *Watts* v. *Indiana*, 338 U. S. 49, 55.

On this ground alone the judgments should be reversed. We treat, nevertheless, of other matters in the briefs and oral arguments.

## II

### The Wagering Stamp Tax Act and Reports Secured Pursuant Thereto Are Unconstitutionally Construed and Applied in This Case

This court considered the constitutionality of the Gambler's Occupational Tax Act, Title 26 Sec. 3285-3298 U.S. Code, and upheld its constitutionality on its face in *U. S.* v. *Kahriger*, 73 Sup. Ct. 510; (No. 167; Oct. 1952). No tax had been paid in that case and no report made pursuant thereto. The court, without having a person before it who had made application for the stamp and who had not reported, gave a speculative opinion on what the law might be. The language of that case therefore is pure dicta.[2] We therefore ask the court to re-examine the law, as now construed and applied in this case, with facts actually before it—including reports to the Internal Revenue bureau required to be made pursuant to this statute which were not before the court when it was passing in the *Kahriger* case,

[2] See definition of "Dictum" under "Courts", Corpus Juris Section 320.

BLURRED COPY

and ruling merely on the constitutionality of the statute under an indictment dismissed on motion.

1. The tax is not a tax on *gambling*—licensed gambling is permitted (97 Cong. Record 12239).

2. Draw poker, stud poker, blackjack, roulette, dice, craps, bingo, and keeno, are exempted.

3. Pari-mutuel betting at race tracks is exempted.

The statute was therefore arbitrarily aimed at the *bookmaker,* not operating at any track, since the moral turpitude has been taken out of betting in California, at least, by the licensing of betting and gambling at race tracks.

The statute as construed and applied in this case, compelled the appellant to apply for a wagering stamp, and to confess that he is engaged in the business of wagering not at a track or licensed place and further to make reports showing the wagers he made contrary to state law and to pay a tax on it, and to make this report available to the prosecutor for prosecution of the state crime.[3] The federal statute has therefore coerced a confession of crime contrary to the Fifth Amendment to the United States Constitution. In *Boyd* v. *U. S.,* 116 U. S. 616, the court said:

> " * * * any compulsory discovery by extorting the party's oath * * * is contrary to the principles of a free government. It is abhorrent * * * to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

In this day and age when we are trying to exemplify standards of liberty and freedom for which three wars have been fought we cannot uphold the compulsory use of force

---

[3] As admirably pointed out in appellee's brief, footnote 1, page 34, the mere possession of the stamp would be regarded in many states as prima facie evidence of guilt. No case raised the question of the constitutionality of using this evidence.

BLEED THROUGH– POOR COPY

to extort confessions whether by the fist or the club of wood or the club of a statute. If it is right for us to say by statute "You confess or you go to federal prison; having confessed you now go to state's prison" then what is wrong with Malenkov, Tito, Peron and others doing the same? The example we set in this case may well have world-wide reverberations regarding our construction of our concept of "ordered liberty."

In *Brown* v. *Walker*, 161 U. S. 591, it was said that there is very little likelihood that a man might be prosecuted by the state although offered immunity under federal statutes and that it was so improbable that no man would suffer it to influence his conduct.

But it has happened here. And the government has compelled by statute a confession of conduct against a particular species of a particular type of occupation at a particular location, which, when carried on at that location, is forbidden by law. Wagering at Santa Anita race track by the same person would be lawful; wagering at 3916 E. 2nd Street, Long Beach, was and is unlawful.

The object then, of the statute, is not to suppress gambling or gamblers—but to secure confessions of crime of a particular species of gambling at unauthorized locations unlicensed by the states, and to enable state prosecutors to use these confessions in state prosecutions, as was done in this case.

The Fifth Amendment forbids federal compulsion to extort confessions of crime. So does the Fourteenth.

*Chambers* v. *Florida*, 309 U. S. 227
*Ashcraft* v. *Tennessee*, 322 U. S. 143
*Lisenba* v. *California*, 314 U. S. 229
*Malinski* v. *N. Y.*, 324 U. S. 401
*White* v. *Texas*, 310 U. S. 530
*Brown* v. *Mississippi*, 297 U. S. 278
*Gallegos* v. *Nebraska*, 342 U. S. 355

A compelled confession of crime would be inadmissible in the federal court under the Fifth Amendment, and would

BLURRED COPY

be objectionable on that ground. If obtained prior to arraignment, it would be objectionable on still further grounds.

*U. S.* v. *Carignan*, 342 U. S. 36
*McNabb* v. *U. S.*, 318 U. S. 332
Fed. Rules Cr. Pr. 26, 18 U.S.C.A., Rule 5a.

It is also inadmissible under the Fourteenth Amendment under the cases cited above.

Federally compelled testimony was never intended to be used in the State Courts.

*Brown* v. *Walker*, 161 U. S. 591.
*Lustig* v. *U. S.*, 338 U. S. 74
*Jack* v. *Kansas*, 179 U. S. 372
*Ballman* v. *Fagin*, 200 U. S. 186
*U. S.* v. *Saline Bank*, 1 Pet. 100 (L. ed.) 69
*Counselman* v. *Hitchcock*, 142 U. S. 547.

This is not the first time an attempt has been made to control people's conduct by stamp tax.

This court had to strike down a stamp tax in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-250. That case was an attempt to muzzle newspapers by putting a special tax on their advertising. It was an attempt to revive an 18th Century tax device. (See May's Constitutional History of England; also opinion in the *Grosjean* case.) There the tax was used to muzzle expression of views; here it is being used to compel expression of crime. The misuse of the tax weapon is the same.

In the *Grosjean* case this court characterized the tax weapon as "a deliberate and calculated device in the guise of a tax" to limit the circulation of information and struck it down. In this case the tax is a "deliberate and calculated device" to compel a confession and this court should strike it down. The misuse of the power is the same in either case. The constitution forbids it.

In view of the above we ask this court to reconsider its decision and dicta in the *Kahriger* case, and in the light of the facts of this case to hold that the Stamp tax Act in-

BLEED THROUGH– POOR COPY

herently and as construed and applied herein is unconstitutional.

A tax whose chief objective is to control morals, politics, thought or deed should not be allowed to stand in a democracy. Today, our government is the potent teacher of the other countries of the world. By its example and leadership, the world will follow.

To paraphrase the language in the *Grosjean* v. *American Press Co.* case:

> "The tax here involved is bad, not because it takes money from the pockets of the appellees. . . . It is bad because, in the light of its history and of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information" etc. (297 U. S. 45-250)

## III

### The Gambler's Occupation Stamp Tax Is Contrary to the Fifth, Tenth and Fourteenth Amendments to the Constitution.

In our petition for certiorari we took the position that the stamp tax was constitutional on its face as a taxing measure. We also took the position that Congress having the power to tax, could not have that tax interfered with. That was prior to this court's decision in the case of *U. S.* v. *Kahriger,* 167 October Term, 1952; 73 Supreme Ct. 510. Inadvertently that argument was carried into our opening brief. We were mistaken and withdraw it.

The act shows on its face and in its congressional history that it was not intended as a true tax matter, but as a police measure. The act itself provides that it does not exempt any person from any penalty for engaging in violation of state law. It also provides for certified copies of the stamp tax record for state prosecutors. Such business is reserved to the states. Tenth Amendment U. S. Constitution.

*U. S.* v. *Constantine,* 296 U. S. 287
*U. S.* v. *Butler,* 297 U. S. 1.

BLURRED COPY

As construed and applied in this case, the act compelled incriminatory disclosures to federal authorities used by the state authorities to convict of a state crime. He was compelled in the present case to confess to past acts, a situation not contemplated in the *Kahriger* case.

## IV

Use of the telephone conversations is forbidden. We have fully covered this point in our opening brief. Appellee makes the point that in earlier cases in this court the disclosures must result from an actual physical connection to telephones. Since the *Goldman* case, 316 U.S. 129, many advances have been made in electronics. Induction coils can now garner voices from afar. Television and radio can be turned on across the room without wire connections. Electronic connection is equal to physical connection.

In any event California law fobids use of such information (Sec. 640 Penal Code) and even if merely secured over the dictaphone—California forbids its use unless authorized by the Chief of Police or District Attorney Sec. 653h, California Penal code.

The police, in the "cool, calm" of a garage, listened in on the private life of appellant from his private bedroom on recorder and loud speaker for a month. What was "whispered in the closet" was "proclaimed from the housetop." (See Louis Brandeis on the Right of Privacy, 4 Harvard Law Review 196)

Such shocking conduct is not "ordered liberty" under the constitution.

We pray for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE,
620 Bartlett Bldg.,
215 West 7th St.,
Los Angeles 14, Calif.

BLEED THROUGH– POOR COPY

BLURRED COPY